Nos. 17460-17461

IN THE

United States Court of Appeals

For the Ninth Circuit

PACIFIC QUEEN FISHERIES, *et al.*,

Appellants,

vs.

L. SYMES, *et al.*,

Appellees.

PACIFIC QUEEN FISHERIES, *et al.*,

Appellants,

vs.

ATLAS ASSURANCE COMPANY, *et al.*,

Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DISTRICT

PETITION OF APPELLANTS FOR REHEARING

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To the Honorable Circuit Judges WALTER L. POPE, STANLEY N. BARNES and FREDERICK G. HAMLEY:

Comes now, PACIFIC QUEEN FISHERIES, *et al.*, the appellants in the above-entitled causes, and presents this, their petition for a rehearing of the above-entitled causes, and, in support thereof, respectfully show:

This petition seeks this Court's reconsideration of its opinion herein filed on August 3, 1962. Appellants' grounds will be stated hereunder in a format approximately following that of the opinion. Newly cited cases will be indicated by an asterisk.

I

The Facts

A. The Court has overlooked or misconceived material facts as follows:

1. The Court has overlooked (Op. p. 3, lines 19-22) the material *admitted* facts that the surveyors were employed by Insurers (R. 778), the survey fees were paid by Insurers (R. 777), that Insurers required the surveys (R. 790) before passing upon a request for insurance and that the 1955 and 1957 surveys were marked: "THIS REPORT IS EXCLUSIVELY FOR THE USE AND INFORMATION OF UNDERWRITERS." (Exh. 16; Exh. 17).

2. The Court has overlooked (Op. p. 4, lines 16-29), the material fact that Elkins' survey certified the seaworthiness of *Pacific Queen* in the following language: "Vessel has been inspected while afloat at Tacoma, Washington and upon compliance with above recommendations, in the opinion of the undersigned will be in satisfactory condition for operation" (Exh. 17).

II

Did Appellants conceal circumstances material to the risk?

A. The Court has overlooked or failed to apply (Op. p. 13, lines 20-22) a principle directly controlling, i.e. Lord Mansfield's statement that the assured need not mention what the underwriter "*takes upon himself the knowledge of*"—Insurers doing this through requiring a survey.

Bates v. *Hewitt,** (1867) L. R. 2 Q. B. 595, 608 ("cardinal rules"), 609 ("never been qualified or questioned"); *Greenhill* v. *Federal Insurance Co.,** (1927) 1 K. B. 65, 86 ("classical passage"); *Eldridge on Marine Policies,** 3rd Ed. (1938) pp. 20-21 ("leading case on this subject"); *Frangos and Others* v. *Sun Insurance Office, Ltd.,* (1934) 49 Ll. L. Rep. 354, 358 (owners could rely on survey by competent

person); *Compania de Navegacion* v. *Firemen's Fund Ins. Co.,** 277 U. S. 66 (1928); case below—19 F. 2d 493, 495 ("survey * * * waived the implied warranty of seaworthiness"); *Freimuth* v. *Glens Falls Ins. Co.,** 50 Wash. 2d 621, 626, 314 P. 2d 468 (1957) (assured justified in relying upon surveyor's approval of trip); *Roth* v. *City Ins. Co.,** 20 Fed. Cas. 1255, 1259-1260 (1855); *Peter Paul, Inc.* v. *Rederi A/B Pulp,** 258 F. 2d 901, 906 (2nd Cir. 1958).

B. The Court has misconceived a material fact and proposition of law (Op. pp. 14-15) in that:

1. It did not recognize that Insurers *knew* gas in bulk was to be carried *below deck,* regardless of the content of the Elkins' survey. See: Marquat survey (Main Br. p. 32); Galbreath admissions (R. 780, 783-786).

2. Such knowledge was sufficient notice to Insurers of the nature of the risk involved. *Mann, MacNeal and Steeves* v. *Capital and Counties Insurance Co.,* (1921) 2 K. B. 300, 306 (petrol carried in *tanks* in engine room sufficient notice); approved in *Kreglinger and Fernau, Ltd.* v. *Irish National Insurance Co., Ltd.** (1956) Ir. R. 116 (underwriter put on inquiry as to details); *New York Life Ins. Co.* v. *Strudel,** 243 F. 2d 90, 93 (5th Cir. 1957) (cursory investigation no excuse); *Columbia Nat. Life Ins. Co. of Boston Mass.* v. *Rodgers,** 116 F. 2d 705, 707 (10th Cir. 1940), cert. den. 313 U. S. 561.

III

Was the *Pacific Queen*, with the privity of Appellants, sent to sea in an unseaworthy condition?

A. The Court failed to apply the doctrine of waiver to alleged unseaworthiness existing prior to the Friday Harbor spill (Op. pp. 19-21).

B. The Court applied incorrect principles of construction which lead it to an incorrect determination of the marine insurance meaning of "privity".

*Eldridge on Marine Policies,** 3rd Ed., (1938), p. 51; *British and Foreign Marine Insurance Co., Ltd.* v. *Samuel*

*Sanday & Co.,** (1916) 1 A. C. 650, 673 (existing law can only be altered by codifying Act by indisputable language); *British and Foreign Marine Insurance Co., Ltd.* v. *Gaunt,** (1921) 2 A. C. 41, 48; *Pac. Coast Coal Freighters Ltd.* v. *Westchester Fire Ins. Co.,** (1926) 4 D. L. R. 963 (Marine Insurance Act "privity" section "a codification of the law as it stood at the time"), aff'd (1927) 2 D. L. R. 590 (C. A.); *Mountain* v. *Whittle,* (1921) 1 A. C. 615, 618-619, 626 (must show awareness of unseaworthiness); *Thomas* v. *Tyne and Wear Steamship Freight Insurance Association,** (1917) 1 K. B. 938, 940-941 (misconduct necessary); followed in *Cohen* v. *Standard Mar. Ins. Co.,** (1925) 30 Com. Cas. 139, 159; *Frangos and Others* v. *Sun Insurance Office, Ltd.,* (1934) 49 Ll. L. Rep. 354, 357 (knowledge necessary).

IV

Did the loss and damage to the *Pacific Queen* result from want of due diligence by Appellants?

A. The Court has overlooked or misconceived a material question in the case in that:

1. It did not give any legal effect to the findings and conclusions of the Coast Guard, adopted by the lower court, that "inrushing sea water" (R. 1082) contributed to the loss of *Pacific Queen* which "sank at the dock in approximately 30 feet of water" (R. 1051). *Leyland Shipping Company* v. *Norwich Union Fire Insurance Society,* (1918) A. C. 350, 363 (need not determine dominant cause unless there is an excepted cause), affirming (1917) 1 K. B. 873,* 883-884 (assured covered under "perils of the sea" when incursion of water caused by shell or torpedo,) 887 ("the fact that the loss is partly caused by things not distinctly perils of the sea, does not prevent its coming within the contract"), 888 (covered when combination of causes includes one covered cause), 895 (same); *Board of Trade* v. *Hain S. S. Co.,** (1929) A. C. 534, 539; *Dudgeon* v. *Pembroke,* (1877) 2 App.

Cas. 284, 297; followed in *Frangos and Others* v. *Sun Insurance Office, Ltd.,* (1934) 49 Ll. L. Rep. 354, 359; *Reischer* v. *Borwick,** (1894) 2 K. B. 548, 551; *Ashworth* v. *General Accident Fire and Life Assurance Corporation,* (1955) Ir. R. 268, 300 (dissent on other grounds).

2. It did not conclude that, in any event, by reason of there having necessarily been some form of "ignition" prior to the explosion, there was coverage under the enumerated "Fire" coverage. See: *Commercial Standard Insurance Company* v. *Feaster,** 259 F. 2d 210 (10th Cir. 1958).

3. It did not conclude that, in any event, there was coverage under the section of the insurance reading "* * * and of all other like Perils", etc. (Main Br. p. 17). *West India Telegraph Company* v. *Home and Colonial Insurance Company,** (1880) 6 Q. B. Div. 51; *Thames and Mersey Marine Insurance Company* v. *Hamilton Fraser & Co.,** (1887) 12 App. Cas. 484, 495 ("operative words"), 500 ("fire" may be extended to similar risks by the general words); *Southport Fisheries* v. *Saskatchewan Gov. Ins. Office,** 161 F. Supp. 81 (D. C. N. C. 1958); *Feinberg* v. *Insurance Company of North America,** 260 F. 2d 523 (1st Cir. 1958).

4. It did not take up, therefore, such controlling cases as *New York, N. H. & H. R. Co.* v. *Gray,* 240 F. 2d 460 (2nd Cir. 1957) (assured recovers even if culpably and grossly negligent), cert. den. 353 U. S. 966, and *Frederick Starr Contracting Co.* v. *Aetna Insurance Co.,* 285 F. 2d 106, 109 (2nd Cir. 1960) ("due diligence" requirement of Inchmaree clause "does not limit the coverage under the perils of the sea clause"), and *Olympia Canning Co.* v. *Union Marine Ins. Co.,** 10 F. 2d 72 (9th Cir. 1926).

5. It did not, in any event, apply a correct standard of "due diligence", even assuming the applicability of the "Inchmaree" clause. See: *Peter Paul, Inc.* v. *Rederi A/B Pulp,** 258 F. 2d 901, 906 (2nd Cir. 1958), cert. den. 359 U. S. 910.

V

Collateral Questions

A. On the question of the time bar provision in the Buffalo policy, the Court misapplied *Phoenix Ins. Co. of Hartford* v. *De Monchy*, 35 Com. Cas. 67.

See: *MacLeod Ross & Co.* v. *Compagnie D'Assurances Generales L'Helvitia De St. Gall,** (1952) All E. R. 331, (1952) 1 Ll. L. Rep. 12 (certificate of insurance separate contractual document).

B. With respect to the jury trial issue, the Court has overlooked a material fact and has misapplied certain legal principles in that:

1. Jury demand was *filed* in the State court (but with a mistaken caption).

2. A new issue with respect to jury trial can be raised on appeal. See: *Shokuwan Shimabukuro* v. *Higayoshi Nageyama,** 140 F. 2d 13 (D. C. App. 1944) and later cases referring to "fundamental error" affecting "substantial rights".

3. The district court abused its discretion. See: *Rehrer* v. *Service Trucking Co.,** 15 F. R. D. 113 (D. C. Del. 1953); *Wardrep* v. *New York Life Ins. Co.,** 1 F. R. D. 175 (D. C. Tenn. 1940); *Angel* v. *McLellan Stores Co.,** 27 F. Supp. 893 (D. C. Tenn. 1939).

VI

Miscellaneous

1. The Court has stretched (Op. p. 17) the District Court's finding (Op. p. 10) that it is "impossible to fix the exact date" of the changes in capacity and took no note of Elkin's *admission* (R. 1188) that he returned to the *Pacific Queen* on an afternoon subsequent to his initial survey for a further check. See: *Greenhill* v. *Federal Ins. Co.,** (1927) 1 K. B. 65, 68 (burden of establishing concealment is upon underwriters).

2. The Court erred in applying the "clearly erroneous" concept to numerous questions of law and mixed questions of law and fact.

3. The Court erred in applying (Op. p. 16) limitation of liability cases where insurance cases have already covered the question.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted and that the questions raised herein may be presented and argued before this Court convened *en banc*.

Dated: New York, New York
August 31, 1962.

Respectfully submitted,

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CERTIFICATE

I, W. Shelby Coates, Jr. of counsel for petitioners-appellants, do hereby certify that in my judgment the foregoing petition for rehearing of these causes is well founded and that it is not interposed for delay.

/s/ W. Shelby Coates, Jr.